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No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1957

DORSEY K. OFFUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Cases:

- *Nilva* v. *United States*, 352 U. S. 385 — 6, 7
- *Offutt* v. *United States*, 348 U. S. 11 — 3, 4
- *Offutt* v. *United States*, 232 F. 2d 69, certiorari denied, 351 U. S. 988 — 4

Statute and Rule:

- 18 U. S. C. 401 — 2
- Rule 42, F. R. Crim. P. — 2

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OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 565–566; Pet. App. 14a–15a) is not yet reported. The memorandum opinion of the District Court (R. 11–22; Pet. App. 1a–13a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1957 (R. 567). The time for filing a petition for a writ of certiorari was extended by Mr. Chief Justice Warren to August 16, 1957, and the petition for a writ of certiorari was filed on that day. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in a proceeding against an attorney for contempt by reason of his conduct as defense attorney in a criminal case, held before a judge other than the one who tried the case, it was proper to introduce the transcript of the original trial to show what the attorney had there said and done.

2. Whether the fact that four years elapsed during the course of petitioner's two appeals which ultimately resulted in a reversal of his convictions for contempt with direction for new trials required dismissal of the charges for lack of a speedy trial.

STATUTE AND RULE

18 U. S. C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, F. R. Crim. P. provides:

> (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and

shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner is seeking a review by this Court of his third hearing on contempt charges arising out of his conduct, in the presence of the court, as defense attorney in the criminal trial of one Peckham in June 52. In *Offutt* v. *United States*, 348 U. S. 11, decided November 8, 1954, this Court reversed petitioner's first conviction which had been affirmed on four specifications by the Court of Appeals for the

District of Columbia Circuit (208 F. 2d 842). In reversing, this Court held that the district judge who had presided at the trial had sufficiently "permitted himself to become personally embroiled with the petitioner" to require that another judge preside at the rehearing of the charges (348 U. S. at 17–18). The case was remanded to the District Court on December 28, 1954.

Petitioner's second conviction, after a hearing held before Judge McLaughlin[1] in May 1955, was also reversed. The conviction on two of the original specifications was set aside. The cause was remanded for a new trial on the remaining two specifications on the ground that the judge had erroneously refused to permit petitioner to submit oral testimony in his defense. *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C.), certiorari denied, 351 U. S. 988.

On remand, the case was tried before Judge Wilkins on the charges of (1) insolent and offensive remarks and gross discourtesy to the court on numerous occasions, and (2) asking of prejudicial questions for which there was no foundation.

Petitioner's motions for a jury trial and dismissal on the ground of denial of a speedy trial were overruled (R. 5–7, 10).

At this third hearing the government, over petitioner's objection, read into the evidence excerpts

[1] On application of the United States Attorney, Judge McLaughlin issued an order requiring petitioner to show cause why he should not be punished for contempt for his misbehavior in the presence of the court at the Peckham trial. This application referred to specific instances as they appeared in the Peckham record (R. 1–4).

from the record of the Peckham trial (R. 67–68). The entire transcript was also admitted in evidence (R. 68).

In defense, attorneys who had been present during all or part of the trial, and whom petitioner consulted during the trial, testified that petitioner's objections to the judge's tone of voice and manner and to the judge's interruption of his examination of witnesses were necessary to protect the client, that petitioner was usually provoked by the judge, and that generally petitioner remained polite and courteous. They said that there was nothing in petitioner's conduct to warrant the judge's raising his voice, and that petitioner in fact was obsequious and afraid that he was going to do something wrong (R. 161, 164–166, 179, 180, 181–186, 201, 205–209, 220, 227, 237, 238–239, 375).

Petitioner testified that he made all of his objections in good faith to the judge, that they were made solely to protect his client, and that the court unduly interfered in the cross-examination of witnesses. He said that he was courteous and polite to the judge and addressed him in a normal tone of voice (R. 377–378, 381, 382, 383, 394, 416–418, 428–433, 435, 437–440, 441–442).

In rebuttal, the government introduced two jurors in the Peckham trial who testified that petitioner consistently refused to obey the judge, constantly objected, and that petitioner provoked and was insulting and discourteous to the court (R. 503–507, 515–516).

The District Court found petitioner guilty on the two specifications of contempt and issued findings of fact and conclusions of law (R. 11–27). Petitioner

was sentenced to a term of imprisonment of 48 hours. On appeal, the Court of Appeals affirmed the conviction on the first specification charging insolent conduct.[2] It remanded with directions that the sentence should be reduced to imprisonment for 6 hours.

ARGUMENT

1. The major portion of the petition for a writ of certiorari is devoted to the argument, variously phrased, that it was error for the presiding judge to receive in evidence and consider the parts of the transcript of the Peckham trial which contained a record of what petitioner said as defense attorney at that trial. Petitioner's conduct at the Peckham trial was, of course, the subject of the contempt proceeding. The transcript was the most direct evidence of what he actually did say there. It was as directly relevant to the issues in this case as is the transcript of a defendant's testimony before a grand jury at a trial for perjury before the grand jury.

Petitioner has wholly misread the recent decision of this Court in *Nilva* v. *United States*, 352 U. S. 385. That case involved a proceeding to punish for contempt an officer of a corporation (who, although of record as attorney for a defendant, had no part in the criminal case) for non-production of books and records pursuant to subpoena, and for false and evasive testimony when explaining his non-production to the trial judge. The transcript which the govern-

[2] The findings of the District Court set forth 43 instances of insolent conduct of petitioner (R. 22–27). The portions of the transcript of the Peckham trial to which the judge refers in these findings appear at pages 69–125 of the record.

ment conceded could not be relied upon was of the testimony of an F. B. I. agent, at the original trial, as to the finding of the books and records under an impounding order of the court, and as to the contents of the records found. It was not, as in this case, a transcript of what the defendant in the contempt proceeding had said and done in a previous proceeding. Indeed, no question was raised in *Nilva* as to the fact that the transcript of what the defendant had said to the judge could be considered.

The Court of Appeals had previously held, and petitioner was in this proceeding granted, the right to call witnesses to explain why he said the words recorded in the transcript. This in no way makes irrelevant the direct record of what he said.[3]

2. The argument that petitioner was deprived of a speedy trial was previously urged by petitioner as grounds for dismissal, rather than remand, when his second conviction was reversed. As pointed out in the government's brief in opposition at that time (No. 928, O. T. 1955), while a certain amount of delay pending review was inevitable, petitioner was himself responsible for some of the delays. For example, after the initial affirmance by the Court of Appeals on November 19, 1953, petitioner sought rehearing in

[3] Petitioner's claim that he should have been granted a jury trial rests for the most part on his argument that the transcript should not have been considered by the trial judge. To the extent that he argues that the judge applied too high a standard of what constitutes proper respectful action (Pet. 23–24), he is merely challenging the sufficiency of the evidence to support his conviction. This contention is fully answered by the findings of the trial court.

that court and then applied for an extension of time to file a petition for a writ of certiorari with the result that his petition was not filed until February 12, 1954. Petitioner did not acquire immunity from prosecution by securing a new trial on appeal.

Petitioner adds here (Pet. 26) that he was prejudiced by the delay because of the death of four defense witnesses, attorneys whom petitioner consulted (R. 411). The absence of their testimony can hardly be said to be prejudicial since petitioner had already submitted the testimony of ten other lawyers on the point that his conduct was necessary to protect his client.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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